SELECTED GUIDELINE APPLICATION DECISIONS FOR THE FIRST CIRCUIT JANUARY 1994-OCTOBER 1998

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Pamela G. Montgomery
Jeanne G. Chutuape
Pamela O. Barron
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CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Bradstreet, 135 F.3d 46 (1st Cir. 1998). The district court erred in departing downward for aberrant behavior, where the defendant testified dishonestly at trial. The court of appeals noted that an aberrant behavior departure is not warranted unless the conduct at issue is both a marked departure from the past and is unlikely to recur. One who testifies dishonestly after engaging in felonious dishonesty cannot credibly make either claim. One convicted of criminal dishonesty is therefore not entitled to an aberrant conduct departure if he has testified dishonestly about his criminal conduct.

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Garcia, 34 F.3d 6 (1st Cir. 1994). The district court did not err in applying §2A2.2. The defendant pleaded guilty to assault of a federal officer in violation of 18 U.S.C. § 111. He argued that the district court incorrectly applied §2A2.2 because his acceptance of responsibility negated the intent to cause bodily harm necessary for aggravated assault. The circuit court disagreed and found that the defendant's acceptance of responsibility was not conclusive that he lacked the requisite intent. Rather, the defendant's aiming the car at the officer supported the inference that he intended to cause bodily harm.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Brandon, 17 F.3d 409 (1st Cir.), *cert. denied*, 513 U.S. 820 (1994). The defendants were convicted of bank fraud and conspiracy to commit bank fraud. They appealed the district court's determination of loss, claiming that the district court improperly assigned to each of them the entire amount of loss without regard to their individual degrees of participation in the conspiracy. The circuit court affirmed, holding that under USSG §1B1.3 it is possible for a defendant to join, and thus foresee and be held accountable for, the operation of the entire conspiracy.

United States v. Lacroix, 28 F.3d 223 (1st Cir. 1994). The district court did not err in including as relevant conduct the acts of the defendant's co-conspirators when determining the amount of loss under USSG §2F1.1. The defendant was convicted of conspiracy to defraud a federally insured financial institution in violation of 18 U.S.C. § 371. He argued that the district court misinterpreted the "accomplice attribution test" because it based its foreseeability finding on the defendant's "awareness" of his co-conspirator's activities. The circuit court concluded that

awareness is germane to the foreseeability prong of the "accomplice attribution test" when that awareness is a knowledge of the nature and extent of the conspiracy in which the defendant is involved. The time from which the sentencing judge should determine foreseeability is the time of the defendant's agreement.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A2.2 Aggravated Assault

United States v. Garcia, 34 F.3d 6 (1st Cir. 1994). The district court did not engage in impermissible double counting when it enhanced the defendant's sentence by four levels for use of a dangerous weapon pursuant to USSG §2A2.2(b)(2)(B). The defendant drove his car at a detective as he was approaching the defendant. He challenged the reliance on his use of the car as the basis for both the underlying predicate offense for the aggravated assault and the dangerous weapon enhancement. The circuit court, acknowledging a split among the courts of appeals, followed the Ninth Circuit in concluding that the use of a single factor to distinguish minor from aggravated assaults and then to distinguish among levels of seriousness is not impermissible double counting. *See* United States v. Reese, 2 F.3d 870 (9th Cir. 1993), *cert. denied*, 510 U.S. 1094 (1994); United States v. Newman, 982 F.2d 665 (1st Cir. 1992), *cert. denied*, 510 U.S. 812 (1993); United States v. Williams, 954 F.2d 204 (4th Cir. 1992); *but see* United States v. Hudson, 972 F.2d 504 (2d Cir. 1992).

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

United States v. Carrington, 96 F.3d 1 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1328 (1997). The circuit court affirmed the district court's calculation of loss under USSG §2B1.1 based on the market value of the items the defendant obtained. The defendant argued that the district court erred in its calculation of loss by relying on the values assigned by the presentencing report instead of using the actual amount of money that the defendant obtained in the sale and the fair wholesale value of the vehicles he bought. Under §2B1.1, comment. note 2, a product's fair market value is ordinarily the appropriate value of the victim's loss. The defendant noted, however, that market value is often difficult to ascertain and therefore, alternative methods of valuation should be employed. The appellate court rejected the defendants argument, and held that it was reasonable for the district court to calculate the market value of each vehicle as the price the defendant negotiated with each dealership. The appellate court joined the Sixth Circuit in equating the market value of a particular item with the price a willing buyer would pay a willing seller at the time and place the property was taken. *See* United States v. Warshawsky, 20 F.3d 204, 213 (6th Cir. 1994). Additionally, the court noted that it was proper for the court to adopt the retail, rather than the wholesale, value of the cars, since all the dealerships from whom the defendant obtained the cars were engaged in the retail sale of automobiles.

United States v. McMinn, 103 F.3d 216 (1st Cir. 1997). The district court erred in imposing a four-level sentence enhancement pursuant to USSG §2B1.1(b)(4)(B) for engaging in "the business of receiving and selling stolen property." The defendant argued that such an enhancement was impermissible unless a defendant was in the business of "receiving and selling property stolen by others." In the instant case, the defendant argued that the sentence enhancement did not apply to a defendant who makes a business of stealing property; that is, a professional "thief," as distinguished from a professional "fence." The government argued that the enhancement should be construed simply to require proof that the defendant's sales of stolen goods had a certain regularity or sophistication, urging the circuit court to adopt the totality of the circumstances test set forth in United States v. St Cyr, 977 F.2d 698 (1st Cir. 1992). The circuit court rejected the government's interpretation as less consistent with the language, history, and purpose of the enhancement guideline. The First Circuit maintained that the plain language of the guidelines governing theft of property under USSG §2B1.1 and the guidelines on receiving stolen property under USSG §2B1.2, together with the evolution of the language employed in the enhancement guideline itself, tended to confirm that the Commission envisioned that "theft" alone did not constitute a "receiving" of stolen property for these purposes.

United States v. Richardson, 14 F.3d 666 (1st Cir. 1994). The defendant was convicted of conspiring to transport, possess, and sell stolen property. He argued that the evidence did not support the value given to the stolen property which resulted in a ten-level increase pursuant to §2B1.1(b)(1)(K), and that the evidence did not support the finding that he was "in the business" of receiving and selling stolen property, which resulted in an additional four-level increase pursuant to §2B1.2 (now §2B1.1, Nov. 1, 1993). The circuit court upheld the district court's determination of loss for §2B1.1(b) purposes. According to Application Note 3, the sentencing court is only required to estimate the loss, given the available information. Under the facts of this case, that district court's finding was not clearly erroneous. The circuit court upheld the finding that the defendant was "in the business" of receiving and selling stolen property. The circuit court stated that there is "no bright line" rule for making such determinations, but the most important factors to consider on a case-by-case basis are the regularity of the defendant's dealings in stolen merchandise and the sophistication of the defendant's operation. Under the facts of this case, the defendant was easily classified as being "in the business" of dealing in stolen goods.

§2B4.1 Bribery in Procurement of Bank Loan and Commercial Bribery

United States v. Wester, 90 F.3d 592 (1st Cir. 1996). The district court erred in calculating loss under USSG §2B4.1 based upon the defendant's release from personal liability on a $12.4 million NEFR loan (obtained in exchange for arranging the $2.3 million loan to his partners in a land development project). The defendant made the following arguments for excluding the value of the $12.4 million loan from the loss calculation: 1) the $12.4 million should not be considered because the $2.3 million loan was not a quid pro quo, and 2) the valuation of the release at $12.4 million was incorrect because this represented the full amount of the loan. The court rejected the defendant's first argument, but accepted his second argument. The commentary to the sentencing guidelines indicates that the face value of the loan is not necessarily an appropriate figure to use for the purpose of calculating loss because, depending upon the circumstances, the value of a loan may be no greater than the difference in the interest

rate obtained through the bribe. At least one court has found that "the value of a transaction is often quite different than the face amount of that transaction." United States v. Fitzhugh, 78 F.3d 1326, 1331 (8th Cir.), *cert. denied*, 117 S. Ct. 256 (1996). The court concluded that it was plain error for neither the parties nor the probation officer to make any attempt to estimate reasonably the value of the release.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Boot, 25 F.3d 52 (1st Cir. 1994). Chapman v. United States, 500 U.S. 453 (1991) held that the entire weight of the carrier medium must be used to determine the amount of LSD attributable to a defendant. Subsequent to this ruling, Amendment 488 became effective, prescribing a 0.4 milligram per-dose formula in calculating LSD quantity. The defendant argued that Congress, by permitting Amendment 488 to take effect, was establishing a unitary per-dose "mixture and substance" formula for calculating LSD weight in both statutes containing mandatory minimum sentencing provisions and guideline sentencing range sentences. In deciding this issue of first impression, the circuit court held that "Chapman governs the meaning of the term `mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v)." The amendment to the guideline did not override the applicability of that term for the purpose of applying any mandatory statutory sentence.

United States v. Raposa, 84 F.3d 502 (1st Cir. 1996). The circuit court declined to decide the question of whether the Fourth Amendment exclusionary rule was applicable in the context of guideline sentencing proceedings. The court upheld the sentence imposed by the district court based solely on the conclusion that it was adequately supported by the facts established in the unobjected-to portions of the presentence report. The defendant argued that the district court erroneously included as "relevant conduct" his possession of a substantial quantity of cocaine that the court had earlier suppressed as the product of an illegal search. The district court held that the defendant's possession of the cocaine found at his apartment constituted "part of the same course of conduct . . . as the offense of conviction pursuant to USSG §1B1.3(a)(2). The district court, relying on cases from other circuits, held that the exclusionary rule did not apply in the sentencing context. *See* United States v. Tejada, 956 F.2d 1256, 1262 (2d Cir.), *cert. denied*, 506 U.S. 841 (1992); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991); United States v. Nichols, 979 F.2d 402, 410-11 (6th Cir. 1992). The appellate court declined to decide this case based on this issue because it did not think that the case presented a proper occasion to decide such an important question. Instead, the court held that the exclusionary rule did not bar the district court from considering the defendant's own voluntary statements included in the presentence report. The portion of the presentencing report that recounted the defendants statements, to which he declined to object, provided an independently sufficient ground for the district court's finding at sentencing that the defendant possessed the cocaine at issue.

United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 117 S. Ct. 201 (1996). The circuit court held that Amendment 515 which added a new subsection (4) to guideline §2D1.1(b)

would not be applied retroactively. Section 2D1.1(b)(4) states that if a defendant meets the requirements of USSG §5C1.2 and has an offense level of 26 or greater, the sentence will be decreased by two levels. The circuit court noted that guideline amendments are applied retroactively if they clarify a guideline but are not retroactive if they substantively change a guideline. *See* United States v. LaCroix, 28 F.3d 223, 227 (1st Cir. 1994). The circuit court concluded that Amendment 515 is substantive because "[i]t added an additional and wholly new part to Guideline §2D1.1(b)." Furthermore, the circuit court noted that the Sentencing Commission did not consider this amendment to be retroactive as it was not included in USSG §1B1.10(c).

United States v. Singleterry, 29 F.3d 733 (1st Cir.), *cert. denied*, 513 U.S. 1048 (1994). The district court did not err when it rejected defendant's argument that stiffer penalties for cocaine base offenses (*e.g.*, "crack") as opposed to cocaine powder offenses, violate the defendant's right to equal protection under the law. At the district court, the defendant offered evidence to demonstrate that the sentencing distinction between cocaine base and cocaine powder is either irrational, racially motivated, or both. On appeal, the defendant argued that the district court erroneously applied the relevant constitutional principles at the sentencing hearing. The First Circuit disagreed, and held that "Congress had before it sufficient . . . information to make distinctions that would justify . . . more severe sentences for trafficking in or using cocaine base or crack than cocaine itself." United States v. Frazier, 981 F.2d 92, 95 (3d. Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993). Furthermore, the First Circuit held that there are "racially neutral grounds for the classification that more plausibly explain" its impact on blacks; thus, there is insufficient evidence "that the distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on the part of either Congress or the Sentencing Commission." Frazier, 981 F.2d at 95.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

United States v. Chorney, 63 F.3d 78 (1st Cir. 1995). The district court did not err in its loss calculation under USSG §2F1.1. The defendant engineered a false appraisal of silver dollars, and was convicted of seven counts of making false statements or reports to a federally insured bank. The district court sentenced the defendant to twenty-seven months imprisonment, followed by three years supervised release, and ordered him to pay $569,469 in restitution to the FDIC. The district court arrived at the $569,469 figure by reducing the amount of the unpaid loan ($2.5 million) by the value of the silver dollars and other assets that the defendant had pledged to secure the loan; and then, the court subtracted the value of unpledged silver dollars ($336,951) that had been seized from the defendant. The defendant unsuccessfully argued that the court should have subtracted the value of the unpledged silver dollars on the date of the discovery of the fraud ($590,602.30) which would reduce his restitution by over $200,000. The district court actually valued the silver dollars from an amount that was in-between the amount the government thought was appropriate (value at time of sentencing) and the value at time the fraud was discovered. The circuit court affirmed the amount computed by the district court and stated that it is the illegal transaction that is to be appraised—not the defendant's overall wealth—and no reason was

provided here to make an exception. The circuit court noted that to give the defendant credit for other, unpledged assets is simply a free ride for the wealthy defendant and wholly at odds with the underlying purpose of the guideline.

United States v. Kelley, 76 F.3d 436 (1st Cir. 1996). The district court did not err in calculating the amount of loss under USSG §2F1.1. The Small Business Administration (SBA) loaned the defendant $55,100, secured by mortgages on his commercial boat and home. In the course of applying for this disaster relief and on a subsequent Progress Report, however, the defendant had made various false statements regarding the purchase of the vessel. The circuit court found that the formula set forth in USSG §2F1.1, comment. (n.7(b)), which applies to fraudulent loan procurement cases, was applicable to this case. The commentary states that the court should take "the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." With respect to the valuation of the house, the defendant asserts that he should be credited with the amount he could have obtained if he had sold the house himself. The circuit court found, however, that USSG §2F1.1, comment. (n.7(b)) clearly states that the value of the loss is to be offset by the amount the lender could expect to recover on the collateral. As this represents the approach implemented by the district court, the circuit court affirmed the district court's determination as to the amount of loss.

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Such Material; Possessing Such Material

United States v. Chapman, 60 F.3d 894 (1st Cir. 1995). The district court erred in interpreting USSG §2G2.2 to include "sexual abuse or exploitation." The defendant argued on appeal that the district court erred in its application of USSG §2G2.2 because the guideline "does not permit the consideration of past sexual abuse or exploitation that is unrelated to the offense of conviction, and because transmission of child pornography by computer is not 'sexual abuse or exploitation' within the meaning of the guideline." The circuit court noted that the terms "sexual abuse" and "sexual exploitation" are not defined in the relevant Sentencing Guidelines or their corresponding statutory provisions, and ruled that sexual exploitation for the purposes of USSG §2G2.2 does not include the computer transmission of child pornography. The court further ruled that the 5-level "pattern of activity" enhancement in USSG §2G2.2(b)(4) is inapplicable to past sexual abuse or exploitation unrelated to the offense of the conviction.

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage by Use of Explosives

United States v. Disanto, 86 F.3d 1238 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1109 (1997). The district court correctly applied USSG §2K1.4(a)(1), the higher of two offense levels under the arson guideline, when computing the defendant's sentence and did not err in its findings that he "knowingly" created a substantial risk of death or bodily injury. The defendant argued that

the district court should have applied USSG §2K1.4(a)(3), which requires computation of the base offense level as 2 plus the base offense level for "Fraud and Deceit." He contended that the overwhelming evidence at trial established that his primary purpose in setting the fire was to defraud the insurance company, not to create a substantial risk of serious bodily injury to bystanders. Similarly, the defendant argued that the district court's findings that he "knowingly" created this risk was not supported by a preponderance of the evidence. The appellate court disagreed, and held that the district court correctly applied §2K1.4(a)(1) because it yielded the highest base offense level, based on its findings that the defendant had created a substantial risk of bodily injury. The circuit court treated the issue of whether the defendant knowingly created that risk within the meaning of §2K1.4 as one of first impression, in that the court had not previously determined what level of knowledge was required under §2K1.4(a)(1)(A). The circuit court applied a two-prong test: (1) whether the defendant's actions created a substantial risk; and (2) whether the defendant acted knowingly to create that risk. Relying upon the PSR, the circuit court held that the defendant clearly created a substantial risk by causing a potential for a fuel air explosion. The fact that fortuitously no one was injured and extensive damage did not result, did not mean that the defendant did not endanger others. Additionally, the First Circuit adopted the definition of "knowledge" as outlined in the Model Penal Code which requires that the defendant be "aware that a substantial risk of death or bodily injury is `practically certain' to result from the criminal act." The circuit court held that the method used to set the fire and the defendant's timing satisfied the `practically certain' standard.

United States v. Ruiz, 105 F.3d 1492 (1st Cir. 1997). On appeal, the government argued that a base offense level of 24 was warranted because under the first prong of USSG §2K1.4(a)(1), the defendants had only to knowingly, not intentionally, create the risk of death or injury. Moreover, the government argued that the defendants satisfied the knowingly requirement because they committed arson at a time when they knew residents were in the very building to which they set fire. The defendant's argued that the district court properly applied a base offense of 20 because it was inconceivable that they would intentionally create a substantial risk of death or serious bodily injury to their family members and they did not destroy or attempt to destroy a dwelling but rather, a store. The district court had interpreted "knowingly" as "intentionally" and thus concluded that the defendants intentionally put his brothers in danger.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Arias, 14 F.3d 45 (1st Cir.) (Table, Text in Westlaw, No. 93-1624), *cert. denied*, 511 U.S. 1058 (1994). The district court properly applied the cross-reference provision of USSG §2K2.1 based on the defendant's use of a firearm in connection with an attempted murder. The defendant first challenged the Commission's authority to punish state crimes by way of the cross- reference. The court followed other circuits and concluded that USSG §2K2.1 applies to both state and federal offenses. The defendant then argued that the district court erroneously applied the guideline for murder because his conduct only amounted to an attempted assault. The district court found that the defendant threatened to kill the victim and then returned with a sawed-off shotgun which the defendant subsequently discharged; the cross-reference to the murder guideline was not clearly erroneous.

United States v. Damon, 127 F.3d 139 (1st Cir. 1997). The district court erred in determining that the defendant's prior conviction for aggravated criminal mischief was a crime of violence. The court of appeals held that, under the Supreme Court's categorical approach to the nature of the crime set forth in Taylor v. United States, 495 U.S. 575 (1990), it was error for the district court to look at the facts of the offense. Instead, the court should have looked at the statutory definition of aggravated criminal mischief. Damon was convicted under a subsection that prohibited damaging or destroying property in an amount exceeding $2000 in order to collect insurance proceeds. The court of appeals noted that, under Taylor, this qualifies as a crime of violence if and only if a serious potential risk of physical injury to another is a normal, usual, or customary concomitant of the predicate offense as set forth in the statute. The court of appeals held that the offense did not necessarily involve a serious potential risk of physical injury to another. The government argued that Damon set fire to the house, and that arson does pose such a risk. The court of appeals agreed that arson posed such a risk, but stated that arson is a separate crime, and simply causing damage to property does not require the damage to be done by arson. According to the court, there are many easy ways to cause $2,000 in property damage which do not risk physical injury to others. Thus, the typical conduct reachable under the statute of conviction does not involve a serious potential risk of physical injury to another; the inquiry is limited to the "usual type of conduct that the statute purposes to proscribe" and does not explore "the other limits of the statutory language or the myriad of possibilities girdled by that language." The district court was precluded under Taylor from looking into the nature of the predicate offense.

United States v. DeLuca, 17 F.3d 6 (1st Cir. 1994). The district court correctly determined the defendant's base offense level based on his prior crime of violence pursuant to §2K2.1(a). The defendant challenged the enhancement because the government failed to identify the nature of the threat which formed the basis of his prior state conviction for extortion. According to the defendant, the guidelines limit "extortion" to conduct which threatens another person while the state statute under which he was convicted reached "threats against the reputation, property or financial condition of another." R.I. Gen. Laws § 11-42-2. Since the government did not identify the nature of the threat, it failed to prove that he committed "a crime of violence." The First Circuit rejected this argument. First, the guidelines specifically list extortion as a crime of violence. There is no requirement that the crime must involve a threat against another person. Although the federal definition of "extortion" has a single, invariant meaning, that definition is not limited to the parameters of the Hobbs Act, 18 U.S.C. § 1951, as the defendant asserted. The court of appeals found that the state statute's broad definition of extortion fell well within the reach of USSG §4B1.2(1)(ii). Second, even if the sentencing court were limited by the definition of extortion found in the Hobbs Act, the fear element could be met not only by threats against the person, but also threats of economic harm. Although the state statute did not mirror the Hobbs Act verbatim, the two laws are sufficiently similar to discredit the defendant's argument. Third, although the guidelines are not statutes, principles of statutory interpretation still apply. Generally, "no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." Lamore v. Ives, 977 F.2d 713, 716-17 (1st Cir. 1992). The defendant's argument that the guidelines limit extortion to threats of bodily harm would render the specific reference in USSG §4B1.2(1)(ii) superfluous since that guideline clearly makes any prior crime that "has as an element the threatened use of

physical force against the person of another" a crime of violence. USSG §4B1.2(1)(i). Finally, the defendant's reliance on United States v. Anderson, 989 F.2d 310 (9th Cir. 1993) was unpersuasive. The Anderson court found that the defendant's prior conviction for attempted extortion did not fall within the scope of the Armed Career Criminal Act because that statute only reaches completed acts. *Id.* at 313. However, unlike the ACCA, the guidelines definition of "a crime of violence" specifically includes attempts to commit such an offense. USSG §4B1.2, comment (n.1).

United States v. Sherwood, No. 97-2179, 1998 WL 568605 (1st Cir. Sept. 11, 1998). The district court did not err in finding that the defendant's prior felony conviction was for a crime of violence, which resulted in a four-level increase in his base offense level under §2K2.1(a)(3). The defendant was convicted of being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). He began acquiring the firearms while on probation for two counts of conviction for second degree child molestation under Rhode Island law. The Rhode Island statute under which Sherwood was convicted, at the time he was charged, prohibited "sexual contact" with a person under 13 years of age. The court of appeals noted that, from the statute, the victim is at most 12 years old. The court agreed with the Fifth Circuit in United States v. Velazquez-Overa, 100 F.3d 418 (5th Cir. 1996), that child molestation crimes "typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures." The court concluded that there is a significant likelihood that physical force may be used to perpetrate this crime and found that the Rhode Island statute at issue punishes a crime of violence.

United States v. Thompson, 32 F.3d 1 (1st Cir. 1994). The district court did not err in applying the cross-reference provision of USSG §2K2.1(c)(2) for the defendant's use of a firearm in connection with the commission of another offense. The defendant and several other individuals were involved in a cocaine distribution enterprise. During a DEA investigation, a confidential informant sought to purchase a handgun while buying cocaine from the group. Although the gun was not available at the time the drugs were purchased, the defendant and another individual sold the gun to the CI upon his return the following day. The court of appeals held that the defendant's constructive possession of the handgun was "in connection with" the previous day's cocaine sale. The circuit court defined the phrase pursuant to its plain meaning, and determined that, for purposes of the cross-reference, the requisite causal link exists "where a defendant's possession of a firearm somehow aids or facilitates, or has the potential to aid or facilitate, the commission of another offense." *See* United States v. Brewster, 1 F.3d 51 (1st Cir. 1993). This broad interpretation of "in connection with" is consistent with the Supreme Court's construction of "in relation to" as that language appears in 18 U.S.C. § 924(c)(1). *See* United States v. Smith, 508 U.S. 223 (1993) ("in relation to" means that the gun at least must facilitate, or have the potential of facilitating the drug trafficking offense).

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996). The district court did not err in its application of a 16-level enhancement pursuant to USSG 2L1.2(b)(2) for unlawfully entering and remaining in the United States. The defendant argued that the enhancement he received was improper because neither of the two previous offenses he committed before being deported were a conviction for an "aggravated felony" and at least one of the offenses was not a "conviction" under state law. The circuit court rejected the defendant's arguments and joined the Fifth, Ninth, and Eleventh Circuits in holding that whether a particular deposition counts as a "conviction" in the context of a federal statute is to be determined in accordance with federal law. *See* Molina v. INS, 981 F.2d 14, 19 (1st Cir. 1992); Wilson v. INS, 43 F.3d 211, 215 (5th Cir. 1995); *cert. denied*, 516 U.S. 811 (1995); Ruis-Rubio v. INS, 380 F.2d 29 (9th Cir.), *cert. denied*, 389 U.S. 944 (1967); Chong v. INS, 890 F.2d 284 (11th Cir. 1989). The appellate court also relied upon the Supreme Court's interpretation in Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983), in which the court held that whether one had been convicted within the language of a federal statute is necessary . . . a question of federal, not state, law, despite the fact that the predicated offense and its punishment are defined by the law of the state. Additionally, the appellate court noted that even if the defendant's second prior possession offense was not a "conviction" his challenge to the application of §2L1.2(b)(2) failed because his earlier conviction for cocaine possession was itself for an "aggravated felony."

United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996). The district court did not err in adding 16 offense levels to the defendant's sentence based on a finding that the defendant had been previously "deported after a conviction for an aggravated felony." *See* USSG §2L1.2. The defendant had been previously deported after a state court conviction for possessing cocaine. At sentencing, the defendant unsuccessfully argued that the term "aggravated felony" should not include his state court felony that would have been punished only as a misdemeanor under federal law. On appeal, the court noted that the commentary to USSG §2L1.2 defines "aggravated felony" as "any illicit trafficking in any controlled substance." This definition, the court held, does not limit the application of the 16-level enhancement to offenses that would be classified as felonies if prosecuted under federal law. Rather, a previous conviction for "any illicit trafficking in any controlled substance" would require the 16-level increase. This position, the court noted, is further supported by the commentary to USSG §2L1.2, which indicates that the "aggravated felony" enhancement applies to offenses "whether in violation of federal or state law."

United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994). The defendant was deported to Columbia after he was convicted for two aggravated felonies. He illegally reentered the United States on September 5, 1991. He was "found" in the United States on December 19, 1991. Between September 5 and December 19, USSG §2L1.2(b)(2) was amended to require, rather than suggest, an increase in the base offense level for an alien whose deportation followed conviction for an aggravated felony. The district court was correct in sentencing the defendant under the amended version of the guideline because the act of illegally entering the United States can occur on three separate occasions: (1) when she/he enters the United States, (2) when she/he

attempts to illegally enter the United States, (3) when she/he is "found" in the United States. Regardless of when the defendant entered the United States, he violated the statute when he was "found" in the United States and was properly sentenced in accordance with the guidelines in effect on that date.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Characteristic)

United States v. Egemonye, 62 F.3d 425 (1st Cir. 1995). The district court did not err in not applying USSG §2X1.1 to determine the amount of loss caused by the defendant's offense. The defendant was convicted of offenses relating to the possession and use of other people's credit cards. The district court computed the loss by including the aggregate credit limit of all the credit cards purchased from the undercover officer, even though many of the cards had not been used. The defendant unsuccessfully argued that only a some of the credit cards should be included in the loss calculation because he had not recovered the amounts from the unused cards. The defendant argued that the court should use USSG §2X1.1 which gives a defendant a three-level discount if he is "some distance from completing the substantive crime." The circuit court rejected this argument and held that USSG §2X1.1 only applies to cases where the substantive offense has not been completed. The court added that §2X1.1 is not relevant to the present case because 14 of the 15 counts against the defendants involved completed substantive offenses. The circuit court noted that under USSG §2F1.1, intended loss should be used if the amount is greater than actual loss. The court concluded that the district court was not in plain error for including "the aggregate limit of $200,000" of all the cards in the amount of loss calculation.

CHAPTER THREE: *Adjustments*

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Cali, 87 F.3d 571 (1st Cir. 1996). The district court's holding enhancing the defendant's sentence based on his role as a manager was in error because the defendant managed property, but not people. USSG §3B1.1. However, the district court's alternative holding that a three-level upward departure was warranted because of the defendant's management of gambling assets was a proper assessment of an encouraged departure factor. USSG §3B1.1, comment. (n.2). The sentence was affirmed.

§3B1.2 Mitigating Role

United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). The district court did not err in determining that the defendant's participation in an attempted robbery fell between a minor and a minimal role, thus warranting a three-level reduction in base offense level. The government had challenged the reduction, arguing that the district court impermissibly based this determination on the fact that the defendant's role as a lookout was less reprehensible than the roles of his co-defendants, and not because he was less culpable. The circuit court rejected this argument, concluding that the record established the defendant was both less culpable than most of his co-defendants and less culpable than the "average person" who commits the same offense. *See* USSG §3B1.2, comment. (n.1-3).

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Noah, 130 F.3d 490 (1st Cir. 1997). The district court did not err in finding that the combination of abilities necessary to prepare and file tax returns electronically qualified as a special skill subject to enhancement under the guidelines. The defendant argued that electronic filing was a task anyone can master. The court of appeals noted that even if an average person can accomplish a specialized task with training, it does not convert the activity into an ordinary or unspecialized activity. "The key is whether the defendant's skill set elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public."

United States v. Reccko, 151 F.3d 29 (1st Cir. 1998). The district court erred in finding that the defendant's position as a switchboard operator at police headquarters was a "position of trust." When the defendant noticed a large group of DEA agents gathering at the station, she alerted her drug dealer friend, who canceled a sizable marijuana delivery that would have taken place that evening. The cancellation thwarted the law enforcement agents. The court of appeals stated that the district court should first have decided where there was a position of trust, and not simply gone to the second step of the analysis, whether the defendant used her position to facilitate a crime. Critical to the first step in the analysis is the question of whether the position embodies managerial or supervisory discretion, the signature characteristic of a position of trust, according to the application notes. The defendant had no such discretion and so could not receive the enhancement.

Part D Multiple Counts

§3D1.4 Determining the Combined Offense Level

United States v. Hernandez-Coplin, 24 F.3d 312 (1st Cir.), *cert. denied*, 513 U.S. 956 (1994). The circuit court affirmed the district court's decision to depart up from less than two years to nine years imprisonment. The defendant, convicted of two separate incidents of smuggling illegal aliens, subjected them to dangerous shipboard conditions and forced passengers overboard into heavy tides, which resulted in two drowning deaths. The circuit court vacated and remanded the sentence, however, based on the district court's misapplication of the grouping rules for multiple counts. The district court failed to combine the groups of closely related counts

under §3D1.4. This resulted in an incorrect starting point for the departure, and remand was required for resentencing from the correct combined base offense level of 13.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Roberts, 39 F.3d 10 (1st Cir. 1994). The district court sentenced the defendant under Criminal History Category II, based upon a 1986 state court diversionary disposition on a charge of driving under the influence of alcohol and operating a motor vehicle to endanger. Those charges were continued by the state court without a finding, upon the defendant's admission of sufficient facts to sustain a finding of guilt. The government urged that under §4A1.1(c), the diversionary disposition was properly counted. The defendant urged the appellate court to follow the Seventh Circuit's opinion in United States v. Kozinski, 16 F.3d 795 (7th Cir. 1994), that such a diversionary procedure amounts to diversion from the judicial process without a finding of guilt, for which no criminal history points may be awarded. The appellate court determined that the government had not carried its initial burden of proof to show that "what happened in 1986 was in substance an admission of guilt," and remanded the case to the district court. The appellate court noted that the district court could also determine that it would give the same sentence within the range regardless of whether it applied category I or II. Finally, the appellate court suggested that the Sentencing Commission might wish to examine this subject and the guideline.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Doe, 18 F.3d 41 (1st. Cir. 1994). The district court did not err in departing from the sentencing guideline range of 21-27 months to 72 months of imprisonment for possessing a gun after a previous felony conviction; the district court found that the guideline range did not adequately reflect the defendant's prior criminal record. The court found that a lawful basis for departure included one of the defendant's prior dangerous offenses, which was already counted under the criminal history section. Despite finding some dismal truth in the defendant's assertion that the nature of an earlier gun crime is not special enough to warrant a departure, the court did not believe that the "felon in possession" guideline automatically rules out consideration of a departure based on dangerous features of an offense. The court also accepted as a basis for departure the defendant's uncounted, juvenile dissimilar offenses. The defendant asserted that the guidelines forbid criminal history departures, where, as here, the departure rests on a juvenile's uncounted criminal conduct. *See* United States v. Samuels, 938 F.2d 210 (D.C. Cir. 1991); United States v. Thomas, 961 F.2d 1110 (3d Cir. 1992). Section 4A1.2, comment. (n.7) does not mention a departure for the presence of uncounted, earlier, dissimilar conduct. This absence of guidance, coupled with the Commission's statement that the guidelines "do not limit the kinds of factors, whether or not mentioned anywhere else in the guidelines that could constitute grounds for departure in an unusual case," allows the district court to depart based on

uncounted juvenile dissimilar convictions. Moreover, the district court's reliance upon subsequent guidelines amendments to provide an analogous range was lawful.

United States v. Nicholas, 133 F.3d 133 (1st Cir. 1998). The district court did not err in counting, for criminal history purposes, the defendant's "admission to sufficient facts" on Massachusetts state charges of larceny and forgery, a procedure the state labeled a "continuance without finding." Under the Massachusetts system in effect at the time, an "admission to sufficient facts" meant an admission to facts sufficient to warrant a finding of guilty.

United States v. Troncoso, 23 F.3d 612 (1st Cir. 1994), *cert. denied*, 513 U.S. 1116 (1995). In addressing an issue of first impression, the circuit court affirmed the lower court's determination that the defendant's state sentence for sale of cocaine was a "prior sentence" within the meaning of USSG §4A1.2. The defendant was in the United States illegally after he had been previously deported in 1988. He was convicted on a state offense for the sale of cocaine for which he received a suspended sentence in April 1993. In August 1993, he was convicted of violating 8 U.S.C. § 1326 based on his earlier deportation and was sentenced in August 1993. He argued that the state offense of selling cocaine was part of the instant offense because he was arrested for the state offense while committing the federal offense. The circuit court joined the Sixth and Tenth Circuits in concluding that the relevant inquiry is "whether the `prior sentence' and the instant offense involve conduct that is severable into two distinct offenses." *See* United States v. Beddow, 957 F.2d 1330 (6th Cir. 1992); United States v. Banashefski, 928 F.2d 349 (10th Cir. 1991). Since the state drug conviction required proof of different elements from the immigration offense, the two constituted severable offenses and the state conviction was properly determined to be a "prior sentence" for criminal history purposes.

§4A1.3 Adequacy of Criminal History Category (Policy Statement)

United States v. Brewster, 127 F.3d 22 (1st Cir. 1997). The district court did not err in departing upward based on defendant's lengthy history of uncharged spousal abuse, even though this conduct was dissimilar to the defendant's offense of conviction. The court of appeals held that a departure based on the inadequacy of a defendant's criminal history score can be based on prior dissimilar conduct that was the defendant was not charged with or convicted of, if the conduct is so serious that, unless it is considered, the criminal history category will be manifestly deficient as a measure of the defendant's past criminal behavior or likely recidivism.

See United States v. Fahm, 13 F.3d 447 (1st Cir. 1994), Rule 35, p. 29.

United States v. Mendez-Colon, 15 F.3d 188 (1st Cir. 1994). The district court departed upward after determining that the defendant's criminal history score underrepresented his criminal history. The defendant claimed the extent of the departure was unreasonable and appealed. The circuit court found that although the district court properly explained why it was departing, it did not explain why this case was so egregious as to warrant departure beyond Category VI. The case was remanded for reconsideration in light of USSG §4A1.3 (p.s.) which directs the sentencing court to move horizontally across the sentencing table until it finds a criminal history category which provides a more appropriate punishment. The court should only depart beyond Category VI when the case involves "an egregious, serious criminal record," in which case the

sentencing court must "explain carefully" why the circumstances are "special enough" to warrant such a departure. USSG §4A1.3 (p.s.).

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Fernandez, 121 F.3d 777 (1st Cir. 1997). The district court did not err in concluding that the defendant's prior conviction for assault and battery on a police officer qualified as a predicate crime of violence for career offender purposes. Although the defendant argued that, under Massachusetts law, the crime can include both violent and non-violent variants, the court of appeals held that the offense usually involves force against another, requires purposeful and unwelcome contact with a person the defendant knows to be a law enforcement officer on duty. The fact that violence and a serious risk of physical harm are all likely to accompany an assault and battery upon a police officer was sufficient to make the crime, categorically, a crime of violence.

United States v. Mangos, 134 F.3d 460 (1st Cir. 1998). The district court did not err in counting the defendant's prior conviction under Massachusetts law for assault and battery as a crime of violence for career offender purposes. The court of appeals examined the elements of assault and battery under Massachusetts common law, noting that a battery may be "harmful" or merely "offensive." Because the state law included both violent and arguably non-violent offenses, the court looked to the charging document to determine that the crime of which the defendant was convicted was a crime of violence.

United States v. Santos, 131 F.3d 16 (1st Cir. 1997). The district court was correct in concluding that the defendant's act in sending a threatening letter to the President of the United States was a crime of violence for career offender purposes. The court of appeals noted that the offense has as an element the threatened use of physical force against another and held that it was irrelevant that the defendant either did not intend to carry out the threat or lacked the ability to do so.

United States Supreme Court

United States v. LaBonte, 520 U.S. 751 (1997). The Supreme Court resolved a split among the Courts of Appeals, deciding that Amendment 506, promulgated by the Sentencing Commission, amending commentary to USSG §4B1.1, the career offender guideline, is "at odds with the plain language of [28 U.S.C.] § 994(h)." In 28 U.S.C. § 994(h), Congress directed the Commission to "assure" that prison terms for categories of offenders who commit a third felony drug offense or crime of violence be sentenced "at or near the maximum term authorized" by statute. The Supreme Court held that by the language "maximum term authorized," Congress meant the maximum term available for the offense of conviction, including any applicable statutory sentencing enhancements. The enhanced penalty, from 20 to 30 years imprisonment, is brought before the court by the prosecutor by filing a notice under 21 U.S.C. § 851(a)(1). The amendment to §4B1.1's commentary at note 2 had provided that the unenhanced statutory maximum should be used, in part because the unenhanced statutory maximum "represents the

highest possible sentence applicable to all defendants in the category," because section 851(a)(1) notices are not filed in every applicable case. The Supreme Court responded that "Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity." "[T]he phrase `at or near the maximum term authorized' is unambiguous and requires a court to sentence a career offender `at or near' the `maximum' prison term available once all relevant statutory sentencing enhancements are taken into account." The judgment of the First Circuit at 70 F.3d 1396 (1st Cir. 1995) is reversed. The Commission's amended commentary is at odds with the plain language of the statute at 28 U.S.C. § 994(h), and "must give way." Cf. Stinson v. United States, 508 U.S. 36, 38 (1993) (Guidelines commentary "is authoritative unless it violates the Constitution or a federal statute").

§4B1.2 Definitions of Terms Used in Section 4B1.1

See United States v. Damon, 127 F.3d 139 (1st Cir. 1997), §2K2.1, p. 8.

See United States v. Sherwood, No. 97-2179, 1998 WL 568605 (1st Cir. Sept. 11, 1998), §2K2.1, p. 9.

§4B1.4 Armed Career Criminal

United States v. Fortes, 133 F.3d 157 (1st Cir. 1998). The district court did not err in counting the defendant's prior conviction for possession of a sawed-off shotgun as a violent felony under the Armed Career Criminal Act. The court of appeals held that, although possession of a firearm by a felon is not a violent felony, certain specialized weapons, such as silencers, machine guns, and sawed-off shotguns, have been found by Congress to be inherently dangerous and lacking in lawful purpose. The court relied on analogies to the career offender guideline's "crime of violence."

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Martinez, 83 F.3d 488 (1st Cir. 1996). The First Circuit, in an issue of first impression, held that the safety valve (USSG §5C1.2(5)) requires the defendant to provide information to the prosecutor, not to the probation officer. The district court denied the defendant the safety valve because he did not provide information to the "Government" as required under USSG §5C1.2(5). The defendant appealed, arguing that his disclosure to the probation office satisfied the requirement of "providing information to the Government." USSG §5C1.2(5). The circuit court concluded that the "Government" in USSG §5C1.2(5) and section 3553(f)(5) refers to the prosecuting authority rather than the probation office. The circuit court noted that USSG §5C1.2 is properly understood in conjunction with USSG §5K1.1. The court stated: "it seems evident that USSG §5K1.1's reference to the 'government' and to 'substantial

assistance in the investigation or prosecution of another person' contemplates the defendant's provision of information useful in criminal prosecutions." The court added that the legislative history of USSG §5C1.2 requires disclosure of information that would aid prosecutors' investigative work. The circuit court noted that while full disclosure to the probation officer may assist the officer in preparing the defendant's presentence report, the probation officer does not create a presentence report with an eye to future prosecutions or investigations. Thus, the circuit court affirmed the district court's holding that the defendant did not satisfy the requirements of the safety valve.

United States v. Montanez, 82 F.3d 520 (1st Cir. 1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of USSG §5C1.2. However, the district court did err in concluding that USSG §5C1.2 requires the defendant to offer himself for debriefing in order to satisfy the requirement that the defendant truthfully provide to the government all information and evidence that he possessed. In this case, the defendant pleaded guilty to conspiracy to distribute drugs and to five substantive counts of possession with intent to distribute. At sentencing, the defendant asked the court to apply the safety valve provision of USSG §5C1.2. In denying the defendant's request, the district court ruled that Congress had intended the safety valve for defendants who tried to cooperate by being debriefed by the government. On appeal, the defendant argued that no debriefing requirement exists. Agreeing with the defendant, the court noted that nothing in 18 U.S.C. § 3553(f) specifies the form or place or manner of the disclosure. However, because it is up to the defendant to persuade the district court that he has "truthfully provided" the required information and evidence to the government, the defendant who declines to offer himself for a debriefing takes a very dangerous course. When a defendant's written disclosure is drawn almost verbatim from a government affidavit, nothing prevents the government from pointing out suspicious omissions or the district court from deciding, as it did in this case, that it is unpersuaded of full disclosure.

United States v. Pacheco-Rijo, 96 F.3d 517 (1st Cir. 1996). The appellate court vacated and remanded the defendant's sentence for the district court to make supplemental findings to clarify on the record why it declined to grant the defendant relief from the mandatory minimum sentence pursuant to USSG §5C1.2. The defendant argued that she met the conditions set forth in the "safety value" provision and had explained the limits of her involvement in the conspiracy. Under USSG §5C1.2, a defendant may avoid the mandatory minimum and be sentenced below the applicable guideline term if the defendant meets the five requirements set forth in the provision, including cooperating fully with the government. The sentencing court held that the defendant had not cooperated fully with the government and had failed to negotiate for relief from the mandatory minimum in her plea agreement. The government did not specify details, however, concerning what the defendant had failed to provide. The circuit court noted that just because the government did not believe the defendant was a passive participant in the drug trafficking offense, did not automatically make her ineligible for relief under the guidelines. The court noted that mere speculation as to the extent of the defendant's cooperation was not intended by the guidelines, and should not be enough to thwart the defendant's efforts to avoid the imposition of a mandatory minimum sentence.

United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995). The district court did not err in denying the "safety valve" provision to the defendant. The defendant argued that he was entitled

to a reduction of the ten-year mandatory minimum sentence under 18 U.S.C. § 3553(f), which in certain circumstances gives the trial court authority to impose a sentence shorter than the otherwise mandatory minimum sentence. The circuit court held that the defendant did not meet the fifth requirement of 18 U.S.C. § 3553(f) which requires a defendant to truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The defendant contended that by unwittingly being recorded by an undercover agent while discussing his plans to distribute cocaine and admitting the allegations by pleading guilty, he has satisfied the truthfulness requirement of 18 U.S.C. § 3353(f). The circuit court rejected the defendant's argument, holding that a defendant has not "provided" to the government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversation conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. In addition, the circuit court held that the requirement is not satisfied merely because a defendant pleads guilty.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. D'Andrea, 107 F.3d 949 (1st Cir. 1997). The district court did not err in assessing restitution against the defendant in the amount of $2.2 million, despite the defendant's claimed inability to pay. A sentencing court must consider the following factors in assessing restitution: amount of loss sustained by the victim; the financial resources of the defendant; the financial needs and earning ability of the defendant; the defendant's dependents and such other factors as the court deems appropriate. Despite the sentencing court's skepticism as to the defendant's ability to make restitution payments, the restitution order is valid. There is no requirement that the defendant be found to have an ability to repay the amount ordered. Instead, there must only be an indication that the sentencing court considered all of the relevant factors in making its determination.

United States v. Gilberg, 75 F.3d 15 (1st Cir. 1996). The district court erred in ordering the defendant to make restitution to banks whose loss, although caused by the defendant, was not caused by the specific conduct that was the basis of the offense of conviction. The defendant was convicted of conspiring to make false statements on 21 loan applications to three FDIC-insured financial institutions. Several additional banks, however, had been defrauded during the course of the defendant's criminal conduct. At sentencing, the district court noted that in 1990 Congress broadened the definition of "victim" in the Victim and Witness Protection Act ("VWPA") to include "any person directly harmed by the defendant's criminal conduct." 18 U.S.C. § 3663(a)(2). Applying 18 U.S.C. § 3663(a)(2), the district court ordered the defendant to make restitution to all of the banks defrauded as a result of the criminal conduct. On appeal, the court noted that the retroactive application of 18 U.S.C. § 3663(a)(2) violated the Ex Post Facto Clause. In so holding, the court aligned itself with the courts of appeals that have already addressed the issue. *See, e.g.*, United States v. Elliot, 62 F.3d 1304, 1313-14 (11th Cir. 1995); United States v. DeSalvo, 41 F.3d 505, 515 (9th Cir. 1994), *cert. denied*, 117 S. Ct. 161 (1996); United States v. Jewett, 978 F.2d 248, 252-53 (6th Cir. 1992).

United States v. Hensley, 91 F.3d 274 (1st Cir. 1996). In considering this issue of first impression, the district court did not err in applying the 1990 amendments to the Victim and Witness Protection Act, which provide that "a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern." This amendment replaced prior court rulings which had limited restitution to "loss caused by the specific conduct that was the basis of the offense of conviction." The court required the defendant to make restitution payments to computer companies which were not listed as defrauded in the indictment under which the defendant was convicted, but whose contact with the defendant occurred during the same period and in the same manner as the fraud for which the defendant was convicted. The circuit court rejected the defendant's first argument that the instance of fraud not contained in the indictment did not fit within the "specifically defined" scheme for which he was responsible. The courts of appeals have consistently upheld restitutionary sentences based on evidence sufficient to enable the sentencing court to demarcate the scheme including its "mechanics . . . the location of the operation, the duration of the criminal activity and the methods used to effect it." United States v. Henoud, 81 F.3d 484, 489 n.11 (4th Cir. 1996); United States v. Turino, 978 F.2d 315, 318 (7th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). The determination as to whether there exists a unitary scheme should be based on the "totality of the circumstances." Undisputed evidence supported a finding in this case that the defendant undertook to defraud multiple computer companies by renting several drop boxes, placing all orders within a two week period, using interstate wires and paying for the goods with counterfeit instruments in each case.

United States v. Royal, 100 F.3d 1019 (1st Cir. 1996). The district court did not err in assessing $30,000 in restitution under USSG §5E1.1. The defendant was convicted of one count of conspiracy and eight counts of mail fraud related to fraudulent student loan checks. A defendant may only be ordered to pay restitution for losses "caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990). An individual convicted of a conspiracy, however, may be held responsible for conduct of co-conspirators in furtherance of the conspiracy that are reasonably foreseeable. Consequently, the defendant's restitution amount may include more than just the $9870 attributable to the mail fraud counts. The defendant also contended that the district court based its loss determination on events occurring prior to his joining the conspiracy. As the defendant waived this issue by failing to raise it below, he must show an error affecting "substantial rights" to reverse the district court's determination. Noting that the district court ordered the defendant to pay only $30,000 of the original $500,000 restitution amount because of his inability to satisfy the entire amount, the appellate court found that it was unlikely that the figure would drop to less than $30,000 even if it had not included losses attributable to conduct occurring before the defendant joined the conspiracy.

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Parkinson, 44 F.3d 6 (1st Cir. 1994). The district court sentenced the defendant to 240 months imprisonment, to be served concurrently with his state sentence. The defendant argued that the sentence was actually a departure from his guideline range of 210-262 months, because he wasn't credited for the 48 months he had already served on his state sentence. The appellate court held that time served in prior state custody is not included under §5G1.3(c) in deciding whether a sentence is within the applicable guideline range. The Sentencing Commission "carefully distinguished a `sentence for the instant offense' from the `total punishment'." "This is appropriate even were the total punishment beyond the range calculated under §5G1.2, because that section is a guide, not a mandate." Moreover, although the sentence was not a departure, a criminal history departure would have been justified in this case based on the defendant's 23 criminal history points, and his commission of two bank robberies within one month of his release from a 15-year sentence.

United States v. Quinones, 26 F.3d 213 (1st Cir. 1994). The district court did not err in imposing consecutive sentences as an upward departure for the defendant's multiple carjacking offenses. The district court reasoned that the defendant's extreme conduct justified a sentence longer than the 180-month statutory maximum that Congress established for carjacking offenses, 18 U.S.C. § 2119(1), and imposed a sentence that was the equivalent of consecutive sentences based on the low end of the defendant's sentencing guideline range. The defendant argued that USSG §5G1.2 required the imposition of concurrent sentences. The circuit court joined the Ninth and Eleventh Circuits in concluding that the lower court possesses the power to impose consecutive or concurrent sentences in a multiple-count case. *See* United States v. Perez, 956 F.2d 1098 (11th Cir. 1992); United States v. Pedrioli, 931 F.2d 31 (9th Cir. 1991). However, that power to deviate from the standard concurrent sentencing paradigm should be classified as a departure and the lower courts must follow departure protocol. Although the district court was correct in determining that the defendant's conduct was significantly atypical, the circuit court remanded for clarification, directing the district court to provide reasons for the extent of the departure, or conduct a new sentencing hearing.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Gondek, 65 F.3d 1 (1st Cir. 1995). The circuit court affirmed the district court's decision to run the defendant's federal sentence consecutively to the state sentence imposed after the state parole violation. The defendant was on state parole at the time of the federal firearms possession offense and the district court followed the directive that the sentence for the new offense "should be imposed to be served consecutively to the term imposed for the violation of . . . parole. . . ." The defendant argued that a consecutive sentence was not mandatory and should not have been ordered. The circuit court noted that USSG §5G1.3(c), Application Note 4 applied directly to this case. Application Note 4 reads: "If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense

should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release." The circuit court joined the Ninth Circuit in ruling that the language of Application Note 4 is mandatory. United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The circuit court held that Application Note 4 is mandatory because Note 4 represents the Commission's determination of what constitutes a "reasonable incremental punishment"; and noted that the situation is closely akin to the case of the defendant who commits a new offense while still in prison, the very situation in which USSG §5G1.3(a) instructs that the new sentence is to be served consecutively.

United States v. Whiting, 28 F.3d 1296 (1st Cir.), *cert. denied*, 513 U.S. 956 (1994). The district court committed plain error when it imposed upon defendant Bartlett a sentence consecutive to his undischarged state sentence. The defendant was serving time for two state second degree murder offenses. The district court concluded that the conduct underlying the state convictions would have supported convictions for first degree murder; since he would be eligible for parole in 16 years the district court determined that a consecutive federal sentence was necessary. The lower court's failure to follow the strictures of USSG §5G1.3, which requires consecutive sentences only "to the extent necessary to achieve a reasonable incremental punishment for the instant offense," amounted to plain error because proper application of the guidelines could result in a different and more favorable sentence for the defendant.

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Jackson, 30 F.3d 199 (1st Cir. 1994). The district court erred in concluding that the defendant's age and the prospective length of sentence were adequate circumstances that warranted downward departure under the sentencing guidelines. The defendant was convicted of several drug related counts which qualified him for a sentence enhancement under 18 U.S.C. § 924(e). Instead of applying the enhancement, the district court departed downward from the specified sentence because it thought that the parameters set by the sentencing guidelines would be tantamount to a "life sentence" in view of the defendant's age. The government appealed, arguing that the reasons stated by the district court were legally insufficient to warrant a downward departure. The First Circuit held that neither the defendant's age nor the duration of his sentence or any combination of those factors are "mitigating circumstances of a kind, or degree, that are not adequately taken into consideration by the Sentencing Commission in formulating the Sentencing Guidelines." 18 U.S.C. § 3533(b).

§5H1.11 Military, Civic, Charitable or Public Service; Employment Related Contributions; Record of Prior Good Works (Policy Statement)

United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). On the government's cross-appeal, the appellate court held that the district court erred in departing downward based on the defendant's history of charitable work and community service in comparison with that of the "the typical bank robber," rather than comparing him to "other defendants with comparable records of good works." The district court should have surveyed

those cases where a factor ordinarily discouraged under §5H1.11 is present, without limiting its inquiry to cases involving bank robbers, and only then ask whether the defendant's case was sufficiently unique to justify a departure.

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Garcia-Velilla, 122 F.3d 1 (1st Cir. 1997). The government was not compelled under the terms of its plea agreement with the defendant to recommend a substantial assistance downward departure. The defendant had breached the plea agreement by refusing to provide the names of those who had supplied her with cocaine while she was out on bail, in derogation of her obligation under the agreement to provide all information known to her regarding any criminal activity.

United States v. Torres, 33 F.3d 130 (1st Cir. 1994), *cert. denied,* 513 U.S. 1098 (1995). The circuit court rejected the defendant's equal protection challenge to the substantial assistance rubric under 18 U.S.C. § 3553(e) and USSG §5K1.1. The First Circuit concluded that the fact that a low-level drug offender with little substantial assistance to offer may receive a higher sentence than a high-level drug dealer who has plenty of information to trade does not render the substantial assistance departure unconstitutional. Rather, the equal protection challenge is easily defeated because the government's interest in offering leniency in exchange for useful information is rationally based. The circuit court also rejected the defendant's claim that the substantial assistance departure conflicts with Congress's objective of achieving fairness in sentencing. The circuit court reasoned that examination of the various statutes in which Congress has referred to the purposes of sentencing reveals a cross-current of objectives other than fairness. In promulgating §3553(e), Congress specifically expressed its intent to provide these departures. The circuit court added that an argument not raised but worth noting is whether the definition of substantial assistance under §5K1.1 as only that assistance which results in further arrests or prosecutions is too narrow and should include "good faith" efforts to assist.

§5K2.0 Grounds for Departure (Policy Statement)

See United States v. Bradstreet, 135 F.3d 46 (1st Cir. 1998), Ch. 1, Pt. A, pg. 1.

United States v. Brennick, 134 F.3d 10 (1st Cir. 1998). The district court departed downward in sentencing the defendant for failure to pay to the government his employees' wage and social security taxes. The court of appeals held that the first reason cited by the district court for departure, the defendant's intent to eventually pay the taxes, could take the case out of the heartland of the tax evasion guideline. Because usually a tax evader intends to deprive the government of the taxes owed, the defendant's apparent intent only to delay payment was not typical of the heartland case of tax evasion. The second reason cited, however, that the tax loss to the government overstated the seriousness of the offense because the losses were due to multiple causes, was not a proper basis for departure. The district court “borrowed” this departure factor from the fraud guideline, but the court of appeals held the factor was

inappropriate. The court of appeals remanded for the district court to explain more adequately the decision to depart and extent of departure.

United States v. Dethlefs, 123 F.3d 39 (1st Cir. 1997). The district court erred in departing downward based on the defendants' decision to plead guilty. The district court viewed the guilty pleas as conduct facilitating the administration of justice, in the light of the significant conservation of judicial resources that resulted in the complex drug and tax case. The court of appeals held that, in theory, a defendant's early agreement to plead guilty and ancillary conduct may have consequences so fay beyond ordinary expectations as to warrant a downward departure for facilitating the administration of justice; however, the factors cited by the district court (the length and complexity of the anticipated trial, the need to relocate the proceedings) did not make the case sufficiently atypical to warrant the departures made by the district court.

United States v. Gifford, 17 F.3d 462 (1st Cir. 1994). The district court erred in determining it lacked discretion to grant the defendant a downward departure based on his extraordinary mental and emotional condition, USSG §§5H1.3, 5K2.13, and on the fact that his conduct amounted to a single aberrant act. The defendant was convicted of the illicit receipt of child pornography after undercover postal inspectors repeatedly contacted the defendant concerning the illicit material. Relying on United States v. Rivera, 994 F.2d 942 (1st Cir. 1993), the First Circuit found that the defendant's case presented an unusual set of circumstances which took his case outside the heartland of the guidelines. The defendant was without the requisite mens rea; he did not recognize the socially unacceptable nature of the materials, he believed all along that the materials were lawful for trade and he assumed that the advertisers (the undercover postal inspectors) who solicited him were acting legally. Since the record made clear that the district court believed it was without the discretion to depart, the court of appeals vacated and remanded for resentencing.

United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996). In considering an issue of first impression, the First Circuit held that to determine whether an offense constitutes a single act of aberrant behavior, the court should review the totality of the circumstances. Two different standards have been employed by the circuit courts to determine whether the conduct at issue constitutes aberrant behavior. The narrow view finds aberrant behavior only for "spontaneous or thoughtless" acts, rather than actions taken after substantial planning. *See* United States v. Marcello, 13 F.3d 752 (3d Cir. 1994); United States v. Glick, 946 F.2d 335 (4th Cir. 1991); United States v. Williams, 974 F.2d 25 (5th Cir. 1992), *cert. denied*, 507 U.S. 934 (1993); United States v. Carey, 895 F.2d 318 (7th Cir. 1990); United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). The more expansive view calls for the court to make its determination based on the totality of the circumstances. *See* United States v. Takai, 941 F.2d 738 (9th Cir. 1991) (affirming downward departure based on a lack of pecuniary gain, no criminal record and enticement by a government agent); *see also* United States v. Fairless, 975 F.2d 664 (9th Cir. 1992) (affirming downward departure based on defendant's manic depression, suicidal tendencies and recent unemployment); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (finding long-term employment, lack of abuse or prior distribution of controlled substances and economic support of family as factors indicating an aberration). The First Circuit held that the court should review such departure determinations under the totality of the circumstances. The circuit court specifically stated a few of the factors that may be considered: defendant's pecuniary gain,

charitable activities, prior benevolent actions, and steps taken to mitigate the effects of the crime. The circuit court noted that spontaneity and thoughtlessness may be considered but are not required elements, and that status as a first-offender may be considered, but would not warrant a departure in and of itself. The circuit court also noted that "single acts of aberrant behavior" can include conduct involving multiple criminal acts. The circuit court remanded the case to the district court for its determination of whether the defendant's actions constituted aberrant behavior under the totality of circumstances standard.

United States v. Hardy, 99 F.3d 1242 (1st Cir. 1996). The district court did not err in granting an upward departure based upon either the defendant's criminal history involving similar offenses or the type of weapons involved in the offense. With respect to defendant's prior criminal activity, USSG §4A1.3 specifically encourages upward departures based on reliable information that a defendant previously engaged in prior similar adult criminal conduct not resulting in a conviction. Given the defendant's recent, persistent and escalating record of violent behavior, the appellate court found it was not an abuse of discretion for the sentencing court to depart upward. In reaching this conclusion, the circuit court rejected the argument that the Commission's decision against making weapon type a specific offense characteristic under §2K2.1 precluded a judicial finding that some types of weapons are more dangerous than others. In this particular case, the use and indiscriminate disposal of multiple weapons elevated the dangerousness of the offense, in keeping with the fact that heightened dangerousness occasioned by the usage and indiscriminate abandonment of the firearms is an encouraged factor for departure. Because this departure was based on both §4A1.3 and §5K2.0, the court's departure from Level 18, Criminal History Category III to Level 18, Criminal History Category VI was justified as an unguided departure.

United States v. LeBlanc, 24 F.3d 340 (1st Cir.), *cert. denied,* 513 U.S. 896 (1994). The district court erred in granting the defendants' motion for downward departure. Although the defendants pleaded guilty to money laundering, 18 U.S.C. §§ 1856, 1857, the district court concluded that their criminal conduct was really gambling and departed downward. The circuit court disagreed and concluded that the lower court interpreted the scope of the money laundering statute too narrowly. The defendants' conduct did fall squarely within the "heartland" of a typical money laundering case; in addition to conducting an illegal gambling business, both defendants actively laundered the money generated by the gambling business, instructing the gamblers to make their checks payable to fictitious payees and negotiating the checks.

United States v. Limberopoulos, 26 F.3d 245 (1st Cir. 1994). The district court misunderstood the basic objectives and interplay between the unlawful-drug-trafficking statute, 21 U.S.C. § 841 and the unlawful-drug prescribing statute, 21 U.S.C. § 843, resulting in an incorrect downward departure. The district court's finding that section 843 only applies to pharmacists while section 841 applies to non-pharmacists was incorrect. The correct distinction between the two statutes is that section 843 punishes unlawful record-keeping by pharmacists and section 841 punishes the unlawful drug distribution by anyone, including pharmacists.

United States v. Morrison, 46 F.3d 127 (1st Cir. 1995). The defendant was sentenced as a career offender. He asserted that he should be granted a downward departure from that sentence because he was not a typical career offender, and the criminal history category overrepresented

his criminal history. He argued that the offense of conviction, a robbery, should be merged with one of the predicate offenses, because they were part of a "downward spiral" brought on by alcohol abuse and depression. The defendant argued that the district court judge's statement: "if I felt I had the authority to depart, I would[.]" showed that the district court mistakenly believed that it did not have the authority to depart. The appellate court held that in determining whether the sentencing court believed it lacked authority to depart, or whether it was merely refusing to exercise its power, the appellate court will "consider the totality of the record and the sentencing court's actions reflected therein." "We do not consider any single statement in a vacuum." Viewing the circumstances as a whole, the appellate court ruled that the sentencing judge knew that he had authority to depart in the case at bar, but chose not to exercise that power under the facts presented in the present case.

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996). The district court erred in holding that the loss of jobs to innocent employees occasioned by defendants' imprisonment was categorically excluded as a basis for departure by §5H1.2, which lists "vocational skills" as a discouraged factor for consideration in the departure decision. In reaching this conclusion the district court relied upon precedential case law, which viewed the Commission's policy statement as being based on the underlying principle that a sentencing judge may grant a departure given the defendant's ability to make work-related contributions to society only in extraordinary situations. However, the district court judge explicitly noted that, if the possibility for business failure were a legally sufficient basis for departure under the guidelines, he would make a departure sufficient to keep the business functioning. The circuit court reversed based upon the Supreme Court's reasoning in Koon v. United States, 518 U.S. 81 (1996). In Koon, the Supreme Court noted that if a special factor under consideration is a discouraged factor, the court should depart only if the factor is present to an exceptional degree or if the case in some way differs from the ordinary case. Categorical rejection of a particular departure factor is inappropriate, because Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. A court, in deciding whether there exists an aggravating or mitigating circumstance of a kind or to a degree not considered by the Commission, should consider only the sentencing guidelines, policy statements and official commentary of the Sentencing Commission. With the exception of the factors courts may not consider under any circumstance, the guidelines do not limit the departure factors for unusual cases, because this would exceed the policymaking authority vested in the Commission. Further, the circuit court disagreed with the government's argument that the loss of employment to innocent employees falls within the meaning of "vocational skills." Given these conclusions and the court's desire to allow the parties to produce qualitative and quantitative evidence which may have been precluded by the district court's categorical approach, the case was remanded for further findings.

United States v. Pelkey, 29 F.3d 11 (1st Cir. 1994). The district court erred in making an upward departure based on the victims' limited ability, due to their ages, to recover from the extent of their financial losses. Although the loss represented the victims' life savings, the victims' limited ability to recover from the financial loss, without more, does not present a repercussion so unusual as to take it out of the heartland of cases contemplated by USSG §2F1.1, Application Note 10. The "special vulnerability resulting from the age of the victims and their relationship with the defendant" had already been taken into account by the adjustment provided for vulnerable victims under §3A1.1.

United States v. Pierro, 32 F.3d 611 (1st Cir. 1994), *cert. denied,* 513 U.S. 1119 (1995). The defendant was convicted of interstate transportation of stolen property and money laundering. The defendant appealed the district court's decision not to depart downward, arguing the district court incorrectly believed it lacked the legal authority to depart. The defendant argued that the district court should have departed downward because the only reason he laundered money was to further his underlying crime. The circuit court rejected this argument, holding that "Congress meant this statute [money laundering] to address, among other things, conduct undertaken subsequent to, although in connection with, an underlying crime, rather than merely affording an alternative means of punishing the underlying crime itself." Therefore, his reason for money laundering does not constitute an appropriate basis for departure. The defendant's next justification for a downward departure was that his offense was impermissibly "double counted" because the same money was used to compute the offense level for the money laundering offense and the interstate transportation offense. The defendant dealt in stolen property worth $2,500,000 and laundered $3,500,000 in profits from the resale of the property. The circuit court found that no impermissible double counting occurred; the defendant was merely being punished for these two activities separately. Lastly, the circuit court rejected the defendant's claim that the sentencing court should have departed downward because his sentence was disproportional to his offense as compared to other co-conspirators.

United States v. Rosales, 19 F.3d 763 (1st Cir. 1994). The appellate court affirmed the district court's decision to depart upward based on the defendant's numerous uncharged acts of similar misconduct. The "frequent and continuous" nature of the defendant's sexual abuse of children was uncontested. The court vacated and remanded the sentence, however, because the district court did not explain its reason for the degree (nine levels) of the departure. Without such an explanation, the appellate court could not evaluate the reasonableness of the nine-level departure.

United States v. Smith, 14 F.3d 662 (1st Cir. 1994). The defendant pleaded guilty to unlawful reentry into the United States following deportation. He challenged the district court's refusal to grant a downward departure. The defendant claims that his reliance on an INS notice that misstated the criminal penalty he would face if he returned to the United States constituted a mitigating circumstance the Sentencing Commission had not taken into account in formulating the guidelines. He argued that the district court believed that it lacked the authority to depart on this basis. The circuit court upheld the sentence finding that although this unusual circumstance was likely not taken into account by the Commission when formulating the guidelines, it is not the type of circumstance the sentencing court should consider to support a downward departure, as it runs counter to the purpose of the sentencing guidelines.

United States v. Snyder, 136 F.3d 65 (1st Cir. 1998). The district court erred in departing downward based on the disparity between the sentence the defendant would have received if convicted under state law and the sentence mandated under the Armed Career Criminal guideline. The court of appeals held that this was not a mitigating circumstance that took the case out of the heartland of armed career criminal cases and justified a downward departure. Nor was the trial court’s concern for the unreviewable discretion of the United States Attorney in prosecuting the matter in federal court when it is proscribed by both state and federal law a valid factor on which to base a departure.

United States v. Twitty, 104 F.3d 1 (1st Cir. 1997). The district court did not err in granting an upward departure based upon both the large number of guns involved in the offense and the endangerment to public safety because the two are not duplicative. The appellate court rejected the defendant's argument that a penalty for endangerment to public safety was inherent in the guidelines and accounted for by the enhancement provisions, so that imposing an additional departure was "double dipping." The appellate court accepted the finding that this was an unusual case falling outside the "heartland" of the guidelines. The sentencing court was in a superior position to determine whether the defendant's responsibility for putting more than 225 serial number obliterated handguns onto the street warranted a more severe penalty than that called for under the enhanced sentencing guideline range.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Pelkey, 29 F.3d 11 (1st Cir. 1994). The district court erred in departing upward based on the victims' psychological injuries. Although psychological harm is listed as a possible departure basis in USSG §2F1.1, Application Note 10, USSG §5K2.3 requires that the injury be a "substantial impairment" that is "much more serious than that normally resulting from the commission of the offense." Although all of the victims reported suffering a lack of trust, frustration, shock and depression, the evidence did not establish that the injuries were "so far beyond the heartland of fraud offenses as to constitute psychological harm within the meaning of the Policy Statement in §5K2.3 or Application Note 10(c) to §2F1.1."

§5K2.11 Lesser Harms

United States v. Carvell, 74 F.3d 8 (1st Cir. 1996). The district court erred in concluding that USSG §5H1.4 barred a downward departure under USSG §5K2.11, the "lesser harms" provision. The facts indicate that the defendant used marijuana to cope with depression and to prevent suicide. Although finding that a reduced sentence under USSG §5K2.11 was warranted because the defendant was using marijuana to avoid the greater possible harm of suicide, the district court believed that §5H1.4, which states that drug dependence is not a reason for a departure, precluded such a departure. The circuit court noted that §5K2.11 is set forth in a different part than §5H1.4, and §5H1.4 is not intended to negate departures set forth in USSG Ch. 5, Part K. The court noted that §5K2.11 contains a limitation on the "lesser harms" provision that states that "[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted." Noting that the avoidance of suicide, rather than the drug use itself, drives the application of §5K2.11, the circuit court stated that the interest in punishing drug manufacturing could be thought to be reduced in this case because the alternative to the defendant's drug use was suicide. The government urged that the classification of marijuana as a Schedule I substance under the Controlled Substance Act "evidences a legislative determination that marijuana `has no currently accepted medical use for treatment'" and, therefore, a departure is precluded. The circuit court rejected this argument, stating that such a classification does not bear on the question of whether the defendant acted "in order to avoid a perceived greater harm." The circuit court vacated the defendant's sentence and remanded for resentencing with the instruction that the defendant's sentence be reduced to the mandatory minimum of 60 months, instead of the 70-month guideline sentence.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors (Policy Statement)

United States v. Claudio, 44 F.3d 10 (1st Cir. 1995). The district court did not abuse its discretion in refusing to postpone the defendant's scheduled sentencing to hear live medical testimony relating to his family circumstances. The district court later offered to accept at the sentencing hearing a proffer of what the absent medical expert's testimony would have been. The circuit court, citing United States v. Tardiff, 969 F.2d 1283, 1286 (1st Cir. 1992), reasoned that there is no automatic right to present live testimony at sentencing, and that testing the value of proposed live testimony by proffer—especially where a postponement would be involved—accords with "common practice and good sense." The circuit court concluded that none of the defendant's arguments showed that the proffer was inadequate in conveying the substance of the medical testimony.

United States v. Garafano, 36 F.3d 133 (1st Cir. 1994). The defendant was convicted in a jury trial of demanding and accepting bribes in violation of the Hobbs Act, 18 U.S.C. § 1951. However, the defendant was charged with multiple briberies and it was unclear whether the jury convicted him of all of the briberies or only one, and the dates of the conduct. The case was remanded for resentencing for the trial court to make an independent assessment of the trial evidence to determine the amount and dates of the bribes for sentencing purposes, to clarify the record.

APPLICABLE GUIDELINES/EX POST FACTO

See United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994), §2L1.2, p. 10.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. McDonald, 121 F.3d 7 (1st Cir. 1997). The district court's failure to inform the defendant at his guilty plea that he faced a mandatory minimum sentence was harmless error because the defendant was sentenced to fifteen months longer than the statutory minimum, without reference to the statutory minimum.

United States v. Medina-Silverio, 30 F.3d 1 (1st Cir. 1994). The district court erred in its procedural application of Federal Rule of Criminal Procedure 11. At the district court plea proceeding, the Rule 11 transcript of the defendant's plea proceeding merely incorporated, by reference only, the defendant's Petition to Enter a Plea of Guilty. On appeal, the defendant objected to the incorporation procedures, arguing that it was too simplistic for the purposes of

Rule 11. The government responded to the defendant's objection by asserting that any error made by the district court was harmless in light of the fact that the defendant completed his Petition to Enter a Plea of Guilty with the assistance of counsel. The First Circuit disagreed with the government, and held that a "total failure to conduct the plea colloquy mandated by Rule 11 cannot be considered harmless error, even where writings evidence the defendant's apparent cognizance of the information which should have been imparted in open court." United States v. Bernal, 861 F.2d 434, 46 (5th Cir. 1988), *cert. denied*, 493 U.S. 872 (1989).

Rule 35

United States v. Fahm, 13 F.3d 447 (1st Cir. 1994). The defendant appealed the district court's reconsideration and subsequent one-month increase of his original sentence 30 days after it had been entered. According to Rule 35(c), the sentencing court may, within seven days after imposing a sentence, correct the sentence where there was an arithmetical, technical, or other clear error. The circuit court, finding that the district court had no inherent power to reconsider its original sentence, held that because the maximum time allowed under Rule 35 had long since passed, the original sentence must be reinstated.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(c)

United States v. Shea, 150 F.3d 44 (1st Cir. 1998). The district court did not err in instructing the jury that it could find the defendant guilty of the use and carrying of a firearm during and in relation to a crime of violence (attempted bank robbery) if it found that a co-conspirator's use of the firearm was a foreseeable act in furtherance of the conspiracy, pursuant to Pinkerton v. United States, 328 U.S. 640 (1946). The court of appeals held that a jury may be instructed on Pinkerton liability in connection with a charged violation of section 924(c) either as the sole or as an alternative theory of liability.

18 U.S.C. § 924(e)

See United States v. Fortes, 133 F.3d 157 (1st Cir. 1998), §4B1.4, p. 16.